Supreme Court, U. S.
FILED
AUG 7 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

No. 74-1409

LONNIE NORTH,

Appellant,

v.

C. B. RUSSELL; NATHANIEL "TRAP" HELTON, Jailer of Harlan County,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF KENTUCKY

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC., AMICUS CURIAE

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Interest of Amicus

The American Civil Liberties Union Foundation, Inc. is a non-profit, non-

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1. This brief is filed with consent of the parties. The letters of consent have been filed with the Clerk of the Court.

partisan organization affiliated with the American Civil Liberties Union. Its sole purpose is the defense of the Bill of Rights. Amicus has always placed special emphasis on protection of the rights of persons accused with crime. Attorneys affiliated with the American Civil Liberties Union Foundation, Inc. presently represent the plaintiffs in Frierson v. West, Civ. No. 74-1074, D.S.C., litigation alleging the unconstitutionality of South Carolina's system of lay magistrates.[1] Amicus contends that in criminal cases trial before a lay judge is inherently prejudicial and deprives defendants of due process and equal protection guaranteed by the fourteenth amendment of the Constitution of the United States.

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1. The civil complaint was dismissed on May 15, 1975, by a three-judge panel without reaching the merits on grounds that plaintiffs lacked standing and failed to show actual prejudice. Slip opinion at p. 13. Notice of appeal was filed on June 16, 1975. South Carolina's magistrates are similar to Kentucky's police judges, except there is no requirement that any magistrates, including those of larger cities, have any particular legal qualifications, training or level of legal knowledge. Cf. Kentucky Revised Statutes Sections 26.140 and 26.150(1), and Kentucky Constitution Section 130.

In addition to limited civil juris-

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diction, magistrates have criminal jurisdiction over "all offenses which may be subject to the penalties of either fine or forfeiture not exceeding one hundred dollars or imprisonment in the jail or workhouse not exceeding thirty days and may impose any sentence within those limits, singly or in the alternative." Section 43-63, Code of Laws of South Carolina, 1962, as amended. Magistrates also have the responsibility of issuing warrants, making or authorizing arrests, conducting preliminary hearings, setting bail, issuing subpoenae, supervising jury selection, conducting jury and non-jury trials, making an election of charges, taking testimony de bene esse, compelling attendance of witnesses and the giving of testimony, ruling on motions to change venue, issuing warrants to break open doors of gambling rooms, endorsing warrants issued by other magistrates, disposing of persons arrested without warrants, and punishing by contempt. Sections 43-114, 116, 131, 132, 133, 134, 201, 202, 211-17, 221, 222, 231 and 241, Code of Laws of South Carolina, 1962, as amended.

Appeal from conviction in the magistrates court is not de novo but is upon a return prepared by the magistrate himself. Section 7-104, Code of Laws of South Carolina, 1962, as amended.

ARGUMENT

The case sub judice is not unique but exemplifies what is constant in a system of lay judges, as the following comparisons between the records in this case and Frierson v. West, supra, demonstrate:

(a) Gross lack of knowledge of substantive and procedural provisions of criminal law. See App. at 18-24. As appears from the record in Frierson v. West, supra, the level of understanding of magistrates of the law, legal principles and procedure is, with all charity, often nonexistent or so minimal as to approach the absurd. See excerpted deposition testimony of Magistrate Robert McLendon, attached as an addendum hereto.[1]

1. Magistrate McLendon was unaware of procedures for jury trials. Deposition of Robert McLendon at p. 116 (hereinafter "McLendon at ___.") He was unaware of the purpose of bail, a defendant's entitlement to it, the factors to be considered or the procedures in setting bail. McLendon at 117-18. He did not know what his duties were in connection with appeals from his court, or whether he was required to prepare a record of trial. McLendon at 120. He did not know the circumstances under which an individual is entitled to a preliminary hearing, nor the procedures to be followed in conducting such a hearing. McLendon at 121-22. He was not familiar with the concept of probable cause

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[footnote continued from preceding page] and had never refused to issue an arrest or search warrant. McLendon at 121-22. He was not familiar with the rules of evidence or the concept of judicial notice. McLendon at 122. He had heard of the hearsay rule, but was unaware of the doctrine of exceptions to hearsay such as declarations against interest or the business records rule. McLendon at 122-23. He was unfamiliar with the concept of impeaching a witness's testimony. McLendon at 123. He stated that a plea of guilty made under the influence of drugs or alcohol could never be withdrawn. McLendon at 124. He was not familiar with the exclusionary rule or whether evidence seized in violation of the fourth amendment must not be allowed into evidence. McLendon at 124. He was not aware of any responsibility he had as a magistrate to determine the voluntariness of a confession before letting it go to a jury. McLendon at 125. He was unaware of the basis of the magistrate's jurisdiction. McLendon at 126. He was not familiar with the concept of statutes being defective because of overbreadth of being void for vagueness. McLendon at 126. He was unfamiliar with the concept of constitutionality and denied that as a magistrate he had the authority to declare a law of the State of South Carolina unconstitutional. McLendon at 126. He was unfamiliar with the concept of reasonable doubt in connection with trials. McLendon at 128.

(b) Lack of legal training. See App. at 15-6. According to Thames and Dreher, Thames-Dreher Research and Design Study, The South Carolina Magisterial System, Judicial Education, University of South Carolina, January 2, 1973, Table 4, p. 22, the majority of South Carolina's magistrates never attended school beyond the 12th grade.[1] Moreover, magistrates receive no formal training prior to taking office involving their judicial duties nor are there any satisfactory provisions made for their on-the-job education. Addendum at 1a.[2] A majority of magistrates themselves acknowledge that they "need" training in learning proper operation of a courtroom, in proper conduct of a trial and in developing bibliographical skills. Thames-Dreher, supra, at p. 14. Another 45% felt that such training "wouldn't hurt." Ibid.

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1. Of the state's 328 magistrates only 16 have law degrees and are members of the bar. Four others have attended law school but have never been admitted to practice. Deposition of Neal Forney, Director of the Department of Judicial Education of the University of South Carolina at pp. 33-4 , Exhibit 3 (hereinafter "Forney at ___ ").

2. The Department of Judicial Education of the University of South Carolina began in 1971 holding 3 to 4 day "schools" for magistrates, but attendance is voluntary and approximately half of the magistrates never attend. Forney at 80, Exhibits 6 and 7.

(c) Lack of access to and ability to use legal material. See App. at 20-3. The library of a South Carolina magistrate may consist of a set of the Code of Laws of South Carolina and nothing else. Addendum at 1a-2a. Neither of the two magistrates deposed in Frierson v. West, supra, had ever read an opinion of any federal court or state court of South Carolina. McLendon at 113-14 and Deposition of Archie H. Chandler, Sr. at 20-1, 28.[1]

(d) Reliance upon non-judicial advice. See App. at 16-7, 30-3. Because of their unfamiliarity with applicable law, their lack of access to research material and their ignorance of bibliographical methods, lay judges rely disproportionately upon advice from non-judicial sources in resolving matters that come before them. Addendum at 2a-3a.

(e) Identification with law enforcement. See App. at 17. One of the findings of the Thames-Dreher study was that lay judges tend to identify more closely with law enforcement and the prosecution than judicial administration, and that the tendency is encouraged by police officers "by

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1. According to Forney: "It takes several years for it [reform and changes in the law] to filter through the Attorney General's and the Governor's and other offices into the magistrate court." Forney at 161.

favoring" prosecution prone magistrates.[1]

> This problem will require extensive treatment in any educational effort and suggest the necessity of coordinating with police officer training programs. The public will not view the magistrate as a judge until the magistrate and officer do.
> Thames-Dreher at p. 11.

(e) Part time judges. See App. at 15. The great majority of magistrates in South Carolina are only part time judges. Forney at 40. Because the state pays magistrates so little (58% make less than $3,000 a year)[2], they take other jobs such as farming, selling insurance, pumping gas or operating a fish camp. Thames-Dreher at p. 20. The low salary accounts in some measure for the high turn-over rate of magistrates in South Carolina, from 50 to 70 a year. Forney at 36-7. As the Thames-Dreher study observes: "It is a job not calculated

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1. Also see, Civil Liberties, "Justice Under A Willow Tree," April, 1975, p. 4: "A black magistrate in Dorchester County, the first in the county's history, reports that after she dismissed speeding charges against a black couple, state highway patrolmen have failed to refer any case to her for trial." (Emphasis in original).

2. Thames-Dreher at p. 27.

to attract the highest calibre applicant."[1]

Lay judges, despite their apparent inability to perform judicial functions, have a profound impact upon the administration of criminal justice.[2] Whatever the historical justification for lay judges, their use for the trial of criminal cases can no longer be defended given the present state of communication and transportation in the United States and the presence of legally trained persons.[3]

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1. Ibid., at p. 12. According to Forney: "We get a cheap man; we get him dirt cheap...a teenage boy working at the mill gets paid more than nearly half the magistrates in the state. A dishwasher at the local cafe makes more than three-fourths of the magistrates in the state." Forney at 141.

2. It is estimated "that eighty-five percent of all the criminal justice in the state [of South Carolina] is administered in the magistrate court and never goes beyond that level." Forney at 105. There is, as noted earlier, no right to a de novo trial from conviction in magistrate's court. Where there is an appeal but some disagreement as to the facts exists, the reviewing court is "bound by the Return of the magistrate before whom the respondent was tried." State v. Sarvis, ___ S.C. ___, ___S.E.2d ___, Op. No. 20066, July 17, 1975.

3. In South Carolina, for example, there are 3,227 persons admitted to the bar, and there is a local bar in every county in the State. Forney at 32 and 1974 Directory of Members, South Carolina State Bar, South Carolina Bar Association, September 1, 1973.

CONCLUSION

The lay judge system is inherently prejudicial. It creates both the appearance and probability of unfairness. Offutt v. United States, 348 U.S. 11, 14 (1954); Estes v. Texas, 381 U.S. 532, 544-45 (1965), and In re Murchison, 349 U.S. 133, 136 (1955).

Decisions of this Court, including Argersinger v. Hamlin, 407 U.S. 25 (1972), extending the right of counsel to all persons exposed to sentences of confinement, Shadwick v. City of Tampa, 405 U.S. 345 (1972), concluding that judicial officers must be capable of resolving legal issues, and Jackson v. Denno, 378 U.S. 368 (1964), recognizing that lay persons are unable to make certain decisions involving the application of constitutional principles, require the reversal of appellant North's conviction and the invalidation of Kentucky's lay judge system.[1]

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1. Amicus recognizes the legal rule of flexibility in securing fundamental trial rights. See e.g., Mayer v. City of Chicago, 404 U.S. 189 (1971) and the concurring opinion of Mr. Justice Powell in Argersinger v. Hamlin, supra, at 44. However, Amicus urges this Court to adopt a rule embodying clear standards in implementing the concept of minimum judicial capacity. Anything different would be troublesome

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ADDENDUM

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practically and difficult to administer as a constitutional standard. In the absence of a clear requirement that judges be admitted to the bar or posses equivalent training, litigants would be forced to challenge the competency of the very people who, if they challenged unsuccessfully, would try them. It is predictable that every trial before a lay judge would involve two trials, one upon the merits and the other questioning the capacity of the court.

Excerpted deposition testimony of Magistrate Robert McLendon, October 15, 1974

Q: Were you given any instructions when you were appointed Magistrate as to how to perform your duties?

A: No, sir.

Q: Did you understand what your duties were prior to your appointment?

A: No, sir, not exactly. [p. 109]

. . .

Q: Do you presently have an understanding of what your duties as a Magistrate are?

A: Well, not really, no. [Ibid]

. . .

Q: What books do you have...that deal with the duties of Magistrate?

A: I got a stack of volume books from the courthouse when I got the job, little red books.

Q: What books are those sir, do you know the names of them?

A: No, sir.

Q: Is that a Code of Laws of South Carolina?

A: Yes, sir, that's right.

Q: Do you have any other books other than those?

A: No, sir.

Q: That pertain to your duties as magistrate?

A: No, sir.

Q: Tell me what your understanding of the Code of Laws is, what is contained in the Code of Laws, as you understand?

A: Well I never have done any reading in it.

Q: You never have had occasion to refer to it?

A: No, sir. [p. 110]

. . .

Q: Have you ever read an opinion of either the Federal District [Court], Court of Appeals or the Supreme Court?

A: No, sir.

Q: Have you ever read a decision of the Supreme Court of South Carolina?

A: No, sir. [pp. 113-14]

Q: What would you do if someone were to request a trial by jury?

A: I would come to Mr. George Stuckey [the county attorney] and find out

what I had to do. [p. 116]

. . .

Q: Do you know the procedure for setting bail?

A: No, sir, not really I don't. [p.117]

. . .

Q: What is the purpose of bail?

A: It is for violation and a good reminder not to do it again. [Ibid]

. . .

Q: Do you know the facts that you would have to take into consideration in setting bail?

A: No, sir.

Q: Do you know whether or not a person has a right to have a bail set?

A: Whether they have a right to have it set?

Q: Yes.

A: No, sir, I don't. [p. 118]

Q: Let's assume that someone has a jury trial to try before you and this person is convicted, is there a procedure as you understand it through which he can appeal his conviction?

A: There would be.

Q: What is that?

A: I don't know exactly when.

Q: Do you know what duties you would have in connection with that appeal?

A: No, sir.

Q: You don't know for example whether or not you would have to prepare a synopsis of the trial?

A: No, I don't. [p. 120]

. . .

Q: Under what circumstances would an individual be entitled to a preliminary hearing?

A: I don't know how to explain it.

Q: Is that because you don't know the answer to the question?

A: I would think so. [p. 121]

. . .

Q: Do you know whether or not a defendant is entitled to cross examine the State's witnesses at a preliminary hearing?

A: I don't know it but I wouldn't think so.

Q: Do you know whether or not he has a right to put up witnesses or his own?

A: No, sir, I don't.

Q: Are you familiar with the concept of probable cause, in connection with preliminary hearings?

A: No, sir.

Q: Or in connection with the issuance of search warrants, or arrest warrants?

A: No, sir. [pp. 121-22]

. . .

Q: Have you ever refused to issue an arrest or search warrant?

A: No, sir.

Q: Are you familiar with the rules of evidence which govern the admissibility of evidence at trials?

A: No, sir.

Q: Have you ever heard or are you familiar with the concept of hearsay evidence?

A: No, sir.

Q: Are you familiar with the concept of judicial notice?

A: No, sir. But now I do know the hearsay

stuff, you can't pay attention to too much hearsay. Just like you could come in and tell me that Mr. Stuckey here hit you side the head and wanted to take out a warrant or something, you didn't have any scars, or somebody else come in and tell me that he had, that would be hearsay.

Q: Let's assume hypothetically that I did get a warrant, for Mr. Stuckey, an arrest warrant and the case was tried and he was the defendant, and I took the stand and said he hit me on the head, would that be hearsay, or if I said Mr. Stuckey said he hit me on the head?

A: If you said Mr. Stuckey said, that would be hearsay.

Q: Are there any exceptions, are you familiar or aware of the rule of exceptions to hearsay doctrine?

A: No, sir.

Q: Are you familiar with the concept of declaration against interest, in the matter of evidence?

A: No, sir.

Q: Are you familiar with the concept of impeaching a witness?

A: No, sir.

Q: Impeaching a witness's testimony?

A: No, sir.

Q: Do you know whether or not business records are admissible in evidence in your court?

A: Business records?

Q: Yes, sir.

A: No, sir, I don't.

Q: Are you familiar with the concept of business records as they relate to evidence?

A: No, sir.

Q: Can anyone who has entered a plea of guilty in your court ever withdraw that plea?

A: No, sir.

Q: What if they claim the next day for example they were under the influence of drugs and alcohol, do you think that could form a basis for withdrawing a plea?

A: No, sir.

Mr. Stuckey: No sir, he can't try a man under the influence of drugs.

Q: (By Mr. McDonald). If you were trying a man under the influence of drugs and he entered a plea and said later that he wanted to withdraw it, could he withdraw his plea under

those circumstances?

A: No, sir.

Q: Are you familiar with the exclusionary rule, does that phrase mean anything to you?

A: No, sir.

Q: Do you know whether or not certain evidence which may have some evidentiary value, do you know whether or not under any circumstances that evidence must not be allowed into evidence because of some Constitutional violation committed by the arresting officers?

A: No, sir, I don't.

Q: Are confessions admissible in evidence, I mean hypothetically. . . if a policeman were to say, I arrested John Doe and he said that he did thus and so, would that testimony be admissible into evidence?

A: Well, after I talked to John Doe it would be.

Q: What would you do to determine whether or not you were going to allow it?

A: I would just talk to John and ask him if it was true.

Q: Are you aware that you have any responsibility as a Magistrate to

determine the voluntariness of a confession before letting it go to the jury?

A: No, sir. [pp. 122-125]

Q: What [cases] can you try?

A: Where the bond is not over a hundred dollars.

Q: And does the penalty for crime have anything to do with your ability to try a case?

A: No, sir.

Q: Are you familiar with the concepts of statutes being defective because they are overly broad.

A: No, sir.

Q: What about the concept of a statute being void because of vagueness?

A: No, sir.

Q: As a Magistrate do you have the authority to declare a law of the State of South Carolina unconstitutional?

A: No, sir. [p. 126]

. . .

Q: Are you familiar with the concept of unconstitutionality or constitutionality?

A: No, sir. [p. 127]

. . .

Q: Are you familiar with the concept of reasonable doubt in connection with a jury trial?

A: Well I would have to say no to it, because I don't really know. [p. 128]